

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Gary Hukriede,

Complainant,

vs.

**ORDER OF DISMISSAL**

Minnesota Democratic Farmer Labor  
(DFL) Party,

Respondent.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge Ann O'Reilly on November 2, 2012, to consider a complaint filed by Gary Hukriede on October 26, 2012. The probable cause hearing was conducted by telephone conference call. The record closed on November 2, 2012.

R. Reid LeBeau II, Jacobson, Buffalo, Magnuson, Anderson, & Hogen, P.C., appeared on behalf of Complainant Gary Hukriede ("Complainant" or "Hukriede"). Charles Nauen, Lockridge Grindal & Nauen, PLLP, appeared on behalf of Respondent the Minnesota Democratic Farmer Labor (DFL) Party ("Respondent"). Zach Rodvold, Campaign Director for the House DFL Caucus also appeared at the hearing.

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not sufficient probable cause to believe that Respondent violated Minn. Stat. § 211B.06.

**ORDER**

**IT IS ORDERED** that there is not probable cause to believe that Respondent violated Minn. Stat. § 211B.06 as alleged in the Complaint and this matter is hereby **DISMISSED**.

Dated: November 9, 2012

s/Ann O'Reilly

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ANN O'REILLY  
Administrative Law Judge

Digitally recorded; no transcript prepared

## **NOTICE OF RECONSIDERATION AND APPEAL RIGHTS**

Minnesota Statutes § 211B.34, subd. 3 provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five (5) business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## **MEMORANDUM**

On October 26, 2012, the Complainant, Gary Hukriede, filed a Complaint with the Office of Administrative Hearings alleging that Respondent, the Minnesota Democratic Farmer Labor Party (DFL), violated Minnesota Statutes § 211B.06 of the Fair Campaign Practices Act by preparing and disseminating political advertising or campaign material regarding Stacey Stout ("Stout"), the Republican-endorsed candidate for House District 43A.<sup>1</sup> Complainant asserts that the campaign materials contain statements that are false and that Respondent knew were false or were communicated to others with reckless disregard of whether they were false.

Specifically, the Complaint alleges that Respondent prepared and disseminated two pieces of campaign material that contain false statements. The first refers to a "Lobbyist Relocation Program" and the second refers to "Stacy Stout's Brand of Tea."<sup>2</sup> The two pieces of campaign materials contain the following allegations:

Stout's a threat to Medicare – In Washington, DC Stout worked against the Medicare prescription drug benefit, [...] <sup>3</sup>

and

Wrong on Medicare. In Washington, DC, Stout worked against the Medicare prescription drug benefit, [...] <sup>4</sup>

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<sup>1</sup> Minnesota House District 43A is comprised of portions of Ramsey and Washington Counties, and includes parts of Maplewood, White Bear Lake, and Mahtomedi.

<sup>2</sup> See Exs. A and B, attached to Complaint.

<sup>3</sup> Ex. A-3, attached to Complaint

<sup>4</sup> Ex. B-1, attached to Complaint.

The Complaint asserts that while Stout worked in Washington, D.C. as an attorney at the Department of Justice, as a staff member for Oklahoma Senator Don Nickles, and as a federal lobbyist, she did not work on issues involving the Medicare prescription drug benefit.<sup>5</sup>

The Complaint contends that the statements on the campaign materials are “patently false, were done intentionally,” and Respondent “either knew the statements to be false or acted with reckless disregard” for the truth in order to injure or defeat Stout in the general election.<sup>6</sup>

At the probable cause hearing, Complainant offered no additional evidence or testimony, and, instead, relied solely upon the Complaint and its exhibits.

Respondent argued that the Complainant, Gary Hukriede, has no personal knowledge of Stout’s work in Washington, D.C. Respondent further asserted that the factual basis for the challenged statements is Stout’s work as legislative counsel for former Senator Donald Nickles (R-Okla.), who publicly voted against a Medicare prescription drug benefit.

### **Legal Analysis**

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the Complaint.<sup>7</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>8</sup> Based upon these standards, the Judge must determine whether, given the facts disclosed in the record, it is fair and reasonable to require the Respondent to go to hearing on the merits.<sup>9</sup>

A violation of Section 211B.06 has two essential elements: (1) the Respondent must intentionally participate in the preparation or dissemination of false campaign material; and (2) the Respondent must know that the item is false, or act with reckless disregard as to whether it is true or false (i.e., act with “actual malice”). The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.<sup>10</sup>

At the probable cause stage of the proceeding, the Complainant has the burden to present evidence sufficient to withstand a motion to dismiss. The Complainant must produce evidence that the statements were false and that the Respondent either published the statements knowing the statements were false; or Respondent “in fact

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<sup>5</sup> Complaint, p. 3.

<sup>6</sup> *Id.*

<sup>7</sup> Minn. Stat. § 211B.34, subd. 2.

<sup>8</sup> 239 N.W.2d 892 (Minn. 1976)

<sup>9</sup> *State v. Florence*, 239 N.W.2d at 902.

<sup>10</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.<sup>11</sup>

### **Falsity of Statements**

The burden of proving the falsity of a factual statement cannot be met by showing that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>12</sup> As interpreted by the Minnesota Supreme Court, Minn. Stat. § 211B.06 is directed against false statements of specific facts, and not against criticism of a candidate or unfavorable deductions or inferences derived from the candidate’s conduct, even if the those deductions or inferences “may be considered extreme and illogical.”<sup>13</sup> Likewise, “[e]xpressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact.”<sup>14</sup>

In his Complaint, Hukriede asserts that:

At no time in Ms. Stout’s career[,] whether at the Department of Justice, as a member of a Senator’s staff, or as a lobbyist[,] has Ms. Stout ‘worked against the Medicare prescription drug benefit’ as the DFL alleges. The DFL makes this claim without citation and without any basis in fact.

At the hearing, Respondent defended its statement by asserting that its claim was based upon Stout’s work as legislative counsel to U.S. Senator Donald Nickles, who publicly opposed a Medicare prescription drug benefit initiative. Respondent argues that the statement is a fair deduction or inference derived from Stout’s previous political involvement and work history. Complainant did not dispute that Senator Nickles opposed the drug benefit initiative.

Notably, neither Complainant nor Stout testified at the hearing. Instead, Complainant relied solely upon the sworn Complaint filed by Hukriede, in which Hukriede simply asserts that Stout’s work has never involved the Medicare prescription drug program. There was no evidence presented as to how Hukriede acquired personal knowledge of everything Stout worked on during her various jobs in Washington, including her work for Senator Nickles.

“Probable cause” is defined in *Black’s Law Dictionary* as:

Reasonable Cause; having more evidence for than against. A reasonable ground for belief in certain facts....An apparent state of facts found to exist

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<sup>11</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

<sup>12</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

<sup>13</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981) (construing pre-2004 statute); See also, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

<sup>14</sup> *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986).

upon reasonable inquiry...which would induce a reasonably intelligent and prudent man to believe...that a cause of action existed.<sup>15</sup>

Complainant's mere assertions, without further support in fact or evidence, are insufficient to establish probable cause in this case. A different result may be reached if Stout, herself, executed the Complaint or submitted a sworn affidavit stating that she had never worked against the Medicare prescription drug benefit. In that case, probable cause would be established because the assertion would be supported in reasonable and reliable fact. However, without some specific factual support for his claims or a basis for his personal knowledge, Complainant's blanket assertions lack sufficient indicia of reliability to withstand the probable cause review.

To counter his lack of demonstrable evidence, Complainant erroneously argues that it is for Respondent to show that its statement has basis in fact; not Complainant's burden to show falsity. This argument misconstrues the burden of proof in this case. It is the Complainant, not the Respondent, that has the burden to establish probable cause for the facts alleged in the Complaint. Thus, it is Complainant's burden to show evidence of falsity (an essential element of a claim brought under Minn. Stat. § 211B.06); not Respondent's burden to prove the truth of the statement asserted.

### **Actual Malice**

Even if the Complaint had established some factual basis to show that the challenged statement was false, the Complainant has not alleged specific facts to show that the statement was made with actual malice, as required under Minn. Stat. §211B.06. A blanket assertion that Respondent, "either knew [the statements] to be false or acted with reckless disregard as to them being false," is not sufficient to meet his burden in this case. Rather, the Complainant must demonstrate some specific facts or present some evidence to support his claims.

After reviewing the Complaint, its exhibits, and the arguments offered by counsel at the probable cause hearing, the Administrative Law Judge concludes that the Complaint has failed to establish probable cause to believe that Respondent violated Minn. Stat. § 211B.06. The Complaint is, therefore, dismissed.

**A.C.O.**

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<sup>15</sup> *Blacks Law Dictionary* 834 (6<sup>th</sup> ed. 1991).